(9)

No. 90-918

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHRISTINE FRANKLIN,
Petitioner,

v.

GWINNETT COUNTY SCHOOL DISTRICT and
DR. WILLIAM PRESCOTT,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF FOR PETITIONER

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Most of the arguments presented by respondents and the United States are of little help in deciding this case because they address a question that is not at issue. Those arguments are aimed directly or indirectly at disputing that petitioner has any cause of action to sue for violations of Title IX. That question, however, was firmly settled by this Court in *Cannon v. University of Chicago*, 441 U.S. 677 (1979). And *Cannon* both is, and should be, accepted in this case. Resp. Br. 7 (respondents "do not ask the Court to abandon *Cannon*"); Pet. Br. 8-10 (discussing reasons why *Cannon* cannot properly be overruled, including congressional "ratification" of decision, prior to the time this suit arose, in 42 U.S.C. § 2000d-7).

Because of *Cannon*, the issue in this case is not "the very existence of a private cause of action in the first

place," but the quite different question of "the nature of the relief that may be awarded to private parties" who concededly have a right of action (U.S. Br. 16)—more particularly, the relief available in a suit under a statute that is utterly silent on the scope of remedies for such a plaintiff.[1] That question, never squarely addressed by respondents and the government, has a well-established answer: the courts are to make available all appropriate, traditional remedies to give effect to such a right of action, unless Congress has somehow spoken to the contrary.[2] That rule not only was established at the time Title IX was enacted but remains in place today. The rule also is correct—necessarily so, because the only alternative would be for the judiciary to nullify the congressional grant of a right of action by refusing to award *any* relief for lack of congressional authorization.

In this case, Congress has not suggested that damages are inappropriate. On the contrary, Congress has indicated that such relief should be available to Title IX plaintiffs. And damages plainly would further rather than undermine Title IX's objectives. Petitioner is accordingly entitled to a damages remedy as relief in this congressionally authorized suit.

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[1] That the questions are distinct was expressly recognized by this Court in *Davis v. Passman*, 442 U.S. 228, 239 (1979): "the question whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive."

[2] *See Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 595 (1983) (opinion of White, J., joined by Rehnquist, J.) ("The usual rule is that where legal rights have been invaded and a cause of action is available, a federal court may use any available remedy to afford full relief."); Pet. Br. 11-14 (discussing cases and noting *Guardians* Court's agreement with presumption).

I. DAMAGES ARE PRESUMPTIVELY AVAILABLE AS RELIEF IN A SUIT, LIKE PETITIONER'S, THAT CONGRESS HAS AUTHORIZED WITHOUT ADDRESSING THE QUESTION OF RELIEF.

The bulk of respondents' brief and large parts of the government's brief argue against damages relief here by borrowing from the several precedents in which this Court, since 1975, has set forth its tightly constrained approach to recognizing implied rights to sue under federal statutes. These arguments are misplaced for at least three obvious reasons. First, the arguments are patently inconsistent with this Court's holding in *Cannon*, not disputed here, that petitioner has an implied right to sue under Title IX. Second, this Court has never extended its implied-right-of-action approach to the distinct question of relief under a statute that is silent on remedies for an authorized suitor. Third, the rationale of the implied-right-of-action cases does not carry over to the present question: indeed, the core of that rationale *supports* the still-recognized rule making traditional remedies presumptively available in suits that Congress has authorized without limiting or otherwise specifying relief.

1. Respondents' and the government's attempt to piggyback on the Court's implied-right-of-action doctrine is self-defeating in this case. Their arguments, if accepted, would make *any* remedy unavailable, including any form of equitable relief, in any suit brought under Title IX by a victim of sex discrimination. Those arguments would therefore overrule *Cannon* in everything but name. Because *Cannon*'s validity must be accepted, *Cannon* itself undermines the heart of respondents' and the government's case.

Even respondents acknowledge (Br. 7)—though the Solicitor General never does—that the broad arguments based on the Court's implied-right-of-action case law prove too much. Thus, if damages were unavailable simply because "the plain meaning of the text of Title IX

does not authorize a damages remedy" (Resp. Br. 4; *see also id.* at 10, 16), then no equitable relief or, indeed, any right of action would be available under Title IX, because it is equally true that the statutory language "says nothing about . . . a private right of action" or about equitable relief (Resp. Br. 10). Similarly, if damages relief were precluded here because Congress *typically* addresses itself to the remedies available in authorized suits (Resp. Br. 21 & App. 1a-14a), then the same fact would preclude any equitable relief and, indeed, the right of action itself, under Title IX. If the constitutional separation of powers barred damages relief simply because Congress has not authorized it (Resp. Br. 22-25; U.S. Br. 8-9, 26), the same argument would preclude equitable relief, which was no more addressed or authorized by Congress in Title IX. And if an award of damages were foreclosed by the fact that "the selection of statutory remedies involves inherently political choices" (U.S. Br. 9), preferably to be made by Congress, then equitable relief likewise must be foreclosed, and *Cannon*'s recognition of a right to sue repudiated. If, on the other hand, petitioner's right of action and the availability of equitable relief are taken as a given—as indeed they are by respondents and, apparently, by the United States—then none of these broad arguments can distinguish damages relief.

2. Respondents' and the government's arguments dwell on this Court's more restrictive approach, since 1975, with respect to implying a private right of action under a federal statute—an approach grounded in the institutional concern that the courts not tread improperly, perhaps unconstitutionally, on legislative turf. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 374-78 (1982); *Cannon*, 441 U.S. at 746-47 (Powell, J., dissenting). But the Court has not in fact carried that approach over to the different question presented here—not whether to infer a right to sue in the first place, but what relief is available when Congress

has granted a right to sue (implicitly or otherwise) but said nothing at all about relief. To the contrary, the established rule that all appropriate, traditional remedies are presumptively available in such circumstances remains good law.

The simple fact is that this Court has never repudiated that rule either by statement or by holding. Indeed, the Court clearly confirmed that the rule is still good law in *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983), where the rule was expressly relied on by some Justices (*id.* at 595 (opinion of White, J., joined by Rehnquist, J.)) and not questioned by any Justice (*see* Pet. Br. 13)—notwithstanding that this Court had been applying its more restrictive implied-right-of-action doctrine for several years. *See Merrill Lynch*, 456 U.S. at 377-78 (discussing strict approach).[3] Although the government tries to suggest otherwise in its brief (U.S. Br. 8-9, 11-14), no precedent undermines the rule recognized in *Guardians*.

Thus, not a single case cited by the government as supporting its position here involved a statute that grants a cause of action to particular individuals (implicitly or otherwise) while leaving the relief available to them wholly unaddressed. Nor did any of those cases discuss, much less repudiate, the principle relied on by petitioner here. Rather, every case involved either a rejection of a particular individual's right to bring a suit under a statute in the first place or consideration of what remedies were available under a statute in which Congress *had* addressed itself to the question of relief.[4]

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[3] *See also, e.g., Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981); *California v. Sierra Club*, 451 U.S. 287 (1981); *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77 (1981); *Universities Research Ass'n v. Coutu*, 450 U.S. 754 (1981); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979).

[4] The following cited cases involved holdings that the plaintiffs had no right of action. *Virginia Bankshares, Inc. v. Sandberg*, 111

In particular, the government relies on *Cort v. Ash*, 422 U.S. 66 (1975), and *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979), as its primary authority U.S. Br. 13-14. But neither of those cases involved a statute in which Congress had granted a private right to sue without addressing the question of relief. Most obviously, in *Cort v. Ash*—the case that initiated the Court's newly restrictive approach to inferring rights of action—the Court held that the plaintiffs had no private right of action under 18 U.S.C. § 610 prior to 1975, stressing that "there was nothing more than a bare criminal statute, with absolutely no indication that civil enforcement of any kind was available to anyone." 422 U.S. at 79-80; *id.* at 74. In addition, the Court in *Cort* also separately addressed the question of private suits for violations of 18 U.S.C. § 610 after January 1, 1975, observing that, after the case had been decided in the court of appeals, Congress enacted a new statute specifically providing for *prospective* enforcement of 18 U.S.C. § 610 by private persons. 422 U.S. at 74-77. Thus, contrary to the government's suggestion, the Court treated the plaintiffs' injunctive and damages claims separately, not because the private right of action question is the same as the question of the availability of various kinds of relief, but rather because the injunctive and damages claims addressed two different periods of time

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S. Ct. 2749 (1991); *Karahalios v. National Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527 (1989); *Thompson v. Thompson*, 484 U.S. 174 (1988); *Texas Indus., Inc., supra*; *California v. Sierra Club, supra*; *Northwest Airlines, Inc., supra*; *Touche Ross & Co., supra*; *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975); *cf. Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986) (assuming no right of action). Of course, the Court found an implied right of action in *Merrill Lynch, supra*, where the plaintiffs were seeking *only* damages for past violations.

In *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), the Court rejected a claim for certain kinds of damages under a statute (ERISA) that expressly specified the remedies available to the plaintiff.

during which two different statutes applied—one of which (post-Jan. 1, 1975) provided for private enforcement, while the other (pre-1975) did not.

Transamerica is likewise inapposite. There, the Court rejected an individual's claim for damages under § 206 of the Investment Advisers Act (15 U.S.C. § 80b-6) only after finding that § 215 of the Act (15 U.S.C. § 80b-15) gave the plaintiff "a right to specific and limited relief in a federal court" for certain violations of § 206 (or other provisions of the Act). 444 U.S. at 18, 23 (Act allows only "limited equitable relief" for plaintiff: *i.e.*, rescission and other relief to ensure that contract in violation of § 206 is "void" as declared by § 215). Thus, *Transamerica* simply confirms the basic rule of statutory construction, repeatedly applied by this Court, that "[w]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Massachusetts Mut. Life Ins. Co.*, 473 U.S. at 147 (quoting *Transamerica*, 444 U.S. at 19; and citing other cases to the same effect). But that rule does not apply to a case such as this, where a statute authorizes a private right of action while leaving the question of remedy entirely unaddressed. *See also* p. 12, *infra*.

3. There is an obvious reason why this Court's post-*Cort* approach to implied rights of action has never been extended to repudiate the established rule that, when Congress *has* granted an individual a right to sue but left remedies wholly unspecified, all traditional remedies are presumptively available. The rationale for the current implied-right-of-action doctrine simply does not carry over to justify abandonment of the rule governing the different issue presented in this case. To the contrary, the institutional concerns underlying that doctrine, far from undermining, actually support the presumptive availability of traditional remedies where Congress has not spoken on the relief awardable to a plaintiff authorized to sue.

The Court's implied-right-of-action doctrine rests fundamentally on a two-fold rationale—the sharply increased volume and complexity of federal legislation and litigation render it ever more impractical for the judiciary to make needlessly uncharted decisions about who may sue, and for Congress to respond to erroneous determinations; and the expanding complexity of federal legislation, with increasingly careful congressional attention to shaping variegated remedial schemes, makes it ever more implausible that Congress left the question of who may sue to be resolved by the judiciary. *See, e.g., Merrill Lynch*, 456 U.S. at 377; Resp. Br. 21 & App. A; U.S. Br. 9; Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 Wm. & Mary L. Rev. 827, 841-43 (1991).[5] Neither of those concerns, however, supports the view that Congress must authorize each particular form of relief before it may be awarded in a case like this. To

[5] Justice Powell, in his *Cannon* dissent, also noted a jurisdictional concern: when the lower federal courts, whose jurisdiction is limited to that which Congress gives them, recognize a right of action, they are creating a federal case. 441 U.S. at 746-47 (Powell, J., dissenting); *see* Mashaw, *supra* at 842-43. That concern has no application to the present question. Once it is accepted that Congress *has* given an individual the right to bring suit in federal court—as it is here—there can no longer be any concern about the federal courts extending their own jurisdiction to cover cases that Congress has not given them. Indeed, Justice Powell wrote the Court's unanimous opinion in *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984), which held that back pay awards were appropriate under Title IX's sister statute, the Rehabilitation Act of 1974, 29 U.S.C. § 794, even though there was no clear congressional authorization for such a remedy.

Related to this jurisdictional issue is the concern that allowing private suits displaces state law by federal law in an area traditionally regulated by the states. *See Cort v. Ash*, 422 U.S. at 78; Mashaw, *supra*, at 843. But, again, this concern has no application where Congress has authorized private suits, making the determination that individuals should have enforceable federal rights in the particular area. Of course, *Cannon* rightly noted that Title IX's prohibition on discrimination by recipients of federal funds is squarely and historically a federal, not primarily a state, concern. 441 U.S. at 708.

the contrary, there are no serious practicality concerns here; and the necessarily dominant concern with respecting presumed congressional intent affirmatively supports the longstanding presumption in favor of traditional remedies for an authorized plaintiff when the question of relief has not been addressed by Congress.[6]

a. As to practicality, respondents and the United States suggest that applying the traditional rule would be grossly impractical because, if damages relief were recognized, the courts would have to answer many questions to give definition to the relief. Resp. Br. 14-15 & n.13; U.S. Br. 15. But this argument is inadequate for two obvious reasons. First, as a logical matter, the practicality concern cannot distinguish damages relief on an implied cause of action from other situations where relief would plainly be available. Second, the relief question presented here cannot raise substantial practical problems because the question arises infrequently (only when the statute grants a cause of action but is silent on relief); by con-

[6] Although the Court's approach to the present question, as to the implied-right-of-action doctrine, is necessarily informed by constitutional concerns about the proper role of the courts in our system, there plainly is no basis for the government's sweeping (and wholly unsupported) assertion that "[t]he courts lack constitutional power to recognize a statutory remedy that Congress has not authorized" (U.S. Br. 26)—even, presumably, where Congress has authorized a private right to sue but failed to address the question of relief. As a matter of both constitutional text and history, the separation of powers cannot be construed as prohibiting the courts from recognizing any remedies for a statutory violation unless Congress has affirmatively authorized them. Indeed, this Court (which has never even embraced Justice Powell's narrower, jurisdiction-based concern) has squarely repudiated such a position even as to the threshold question of implied rights to sue: the Court has noted, as Justice Frankfurter explained long ago, that the "judicial power" of Article III courts readily encompasses, and for almost 200 years was repeatedly held to encompass, the power to award appropriate relief as long as such relief was not precluded by Congress. *Merrill Lynch*, 456 U.S. at 375-77; *Montana-Dakota Utils. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 261-62 (1951) (Frankfurter, J., dissenting).

trast, the question whether to infer a right of action in the first place can arise with respect to virtually every statute enacted by Congress.

Thus, if damages relief were to be held unavailable here simply because recognizing such relief raises follow-up questions, then so too would injunctive relief and back pay. All of the so-called "collateral issues" identified by the government—such as "statutes of limitations, applicable standards of proof and causation, the availability of *respondeat superior* liability, the necessity for exhaustion of administrative remedies, [and] the relation between the implied remedy and express statutory remedies" (U.S. Br. 15; *see also* Resp. Br. 14-15 n.13)—must also be answered in a suit only seeking equitable relief. Equally important, the practicality argument would demand judicial nullification of statutes that, rather than leaving relief entirely unspecified, simply authorized "liability" in an "action at law" (*see, e.g.*, 42 U.S.C. § 1983) or simply authorized "such relief as the court determines is appropriate" (*see, e.g.*, 20 U.S.C. § 1415(e)(2), discussed at note 7, *infra*). Neither statute leaves fewer questions to be answered in judicial application. For example, every single follow-up question identified by respondents and the government—including the measure of compensatory damages and the availability of punitive damages—is raised by and must be answered under a statute, such as 42 U.S.C. § 1983, that provides for "liability" in an "action at law." Yet such statutes have never been treated as unenforceable, and could not properly be so treated, merely because Congress was silent with respect to issues that inevitably arise in application. There is no more warrant for denying damages relief on that ground here.

In any event, the question presented in this case is, by respondents' and the government's own account, a highly unusual one. The question arises only for those few statutes that provide a cause of action while leaving relief entirely unspecified. As respondents and the government

expressly confirm, such statutes are rare. And because this Court's great reluctance to recognize implied rights of action since 1975 has made such statutes a truly endangered species, the question is not likely to arise much in the future.[7]

b. What remains, then, is the preeminent concern with respecting congressional will. The strong reluctance to find implied rights of action reflects the now-realistic presumption that, when Congress explicitly provides for specified suits by specified parties, its omission of other suits

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[7] Respondents' statutory appendix, far from supporting their position in this case, illustrates how uncommon is the question presented here. All but one of the numerous federal statutes listed in the appendix specify the remedies available to the individuals who are authorized to sue. None of those statutes, therefore, raises the question of what relief is available when the statute is utterly silent on remedies.

The only statute listed by respondents that does not address the question of remedies is the National Historic Preservation Act, 16 U.S.C. § 470 *et seq.*, which carries an implied private right of action. But even there, limits on relief are suggested by the attorney's fees provision that implicitly (and clearly) authorizes the private right of action in the first place ("by any interested person to enforce the provisions" of the Act). 16 U.S.C. § 470w-4. We also note that one of the statutes that addresses remedies does so quite broadly: the Education for All Handicapped Children Act, 20 U.S.C. § 1400 *et seq.*, expressly authorizes a civil action in which the court may "grant such relief as the court determines is appropriate." *Id.* § 1415(e)(2). This Court, far from nullifying the statute for lack of sufficient guidance, has held that "retroactive reimbursement" is available under that provision. *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 370 (1985).

In short, if respondents' list is representative, the situation presented in this case—a statute authorizing an individual to sue but saying not a word about the available relief—is indeed rare. The United States agrees: "For decades at least, Congress has devoted great care to the remedies it has provided for statutory violations. Federal statutes provide for various combinations of private and governmental remedies . . . For many years, there has been no empirical justification for a presumption that Congress intends to provide a full array of remedies for any statutory violation." U.S. Br. 9.

reflects a deliberate choice that should ordinarily be respected. Similarly, when Congress expressly provides for particular forms of relief to particular authorized plaintiffs, it must naturally be presumed that Congress meant other forms of relief not to be available. But when Congress has authorized an individual to sue and said absolutely nothing about the available relief, the situation is dramatically different: there is then no longer any justification for presuming, on the basis of the actions that Congress actually took, that Congress must have wanted to restrict rights of action or remedies.

When Congress has authorized a plaintiff's suit but left relief issues entirely unaddressed, the natural presumption is and must be—as reflected in the traditional remedy rule—that Congress has left the determination of appropriate relief to the courts, applying their customary standards.[8] Since there is no evidence of a congressional selection among forms of relief, the only alternative to the traditional remedy rule would be to presume that the plaintiff is to be denied any relief whatever. But that approach, of course, would nullify the congressionally authorized cause of action. Thus, while judicial recognition of unexpressed rights of action or relief—in the face of explicit rights to sue or forms of relief—risks thwarting congressional will, in the present situation, it would be the *denial* of relief, where Congress has not evidenced a restrictive intent, that risks flouting congressional will. In short, if the courts refuse to exercise their expected authority to apply traditional remedies when Congress is silent, they effectively disallow any cause of action in the face of congressional intent that plaintiffs like petitioner be allowed to sue.

[8] That is especially so in cases involving statutes enacted at a time when the even broader authority to recognize rights of action in the first place was regularly, and with congressional awareness, being exercised by the courts. *See Cannon*, 441 U.S. at 718 (Rehnquist, J., concurring).

Indeed, it would be especially anomalous to presume, in a merged system of law and equity, that Congress meant no relief to be available when it has authorized a suit but left remedies unspecified. When Congress allows an individual to file a "suit in equity," there is no further need for specificity before all appropriate forms of equitable relief are available. Similarly, when Congress allows an individual to file an "action at law," all traditional forms of legal relief are presumptively available, without need for further specificity from Congress. So, too, when Congress, without specifying "law" or "equity," simply grants an individual a right to bring a lawsuit in the federal courts—which have long operated as both law and equity courts—*any* form of traditional, appropriate relief must be presumed to have been congressionally authorized. The very breadth of the leeway left the courts cannot legitimately be turned upside down and transformed into a license to nullify the congressional grant of the cause of action.

II. DAMAGES RELIEF IS AVAILABLE UNDER TITLE IX.

To sustain rejection of damages relief, then, respondents and the government must show that such a remedy is somehow inconsistent with Title IX. This they cannot do. To the contrary, the best indication is that damages relief must be found to be available even if affirmative congressional authorization is required.

1. Most tellingly, Congress has by clear implication confirmed that damages are consistent with Title IX. Congress enacted the Civil Rights Remedies Equalization Amendment of 1986 to declare that "[a] State shall not be immune . . . from suit in Federal court for a violation of . . . title IX" or "any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. § 2000d-7(a)(1).[9] That abrogation

[9] The next paragraph states that "[i]n a suit against a State . . . remedies (including remedies both at law and in equity) are avail-

of States' Eleventh Amendment immunity (*cf. Dellmuth v. Muth*, 491 U.S. 223, 229-30 (1989)), as a matter of both legislative history and necessary implication of the statutory text, embodies Congress's intent to allow private damages actions under Title IX.

First, as the legislative history expressly states, the provision was enacted for the express purpose of overturning this Court's decision in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985)—a case that, as Congress was aware, specifically involved a claim for "compensatory," "retroactive monetary relief" (*id.* at 236, 235). *See* S. Rep. No. 388, 99th Cong., 2d Sess. 27-28 (1986) (stating that the aim of the law was to reverse *Atascadero*'s rejection of suits against states "for retroactive monetary relief under Section 504 of the Rehabilitation Act" and other comparable statutes such as Title IX). Second, and perhaps more important, beyond its drafters' expressed intent, the 1986 Act's abrogation of Eleventh Amendment immunity makes no sense unless retroactive monetary relief is available under Title IX, Section 504, and related statutes. There is no point whatever to abrogating Eleventh Amendment immunity unless monetary relief is available under the statute, because injunctive relief against a state action can always be obtained by suing the responsible state officials, who, under *Ex Parte Young*, 209 U.S. 123 (1908), cannot claim any Eleventh Amendment immunity. The 1986 Act thus inescapably requires, in order not to be wholly meaningless, that monetary relief in private actions under Title IX be available.

2. None of respondents' and the government's arguments can overcome this clear indication of congressional

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able . . . to the same extent as such remedies are available . . . against any public or private entity other than a State." 42 U.S.C. § 2000d-7(a)(2). These provisions took effect "with respect to violations that occur in whole or in part after October 21, 1986" (42 U.S.C. § 2000d-7(b)) and therefore were the law at the time that the present case arose.

policy or even, on their own terms, establish that damages are incompatible with Title IX. In the first place, respondent incorrectly suggests that it would have been "truly revolutionary" (Resp. Br. 29-30) for Congress to have authorized monetary relief against municipalities in 1972, the year Title IX was passed. By then, Congress had already enacted Title VIII of the Fair Housing Act of 1968, 42 U.S.C. § 3601 *et seq.*, providing a damages remedy (*id.* § 3612(c)), applicable to governmental as well as private parties. *See, e.g., Mayers v. Ridley*, 465 F.2d 630 (D.C. Cir. 1972); *United States v. City of Black Jack, Missouri*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975). In addition, monetary damages had quite prominently been approved as a remedy available to plaintiffs exercising implied rights of actions under civil rights statutes, such as 42 U.S.C. § 1982. *See Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969). Further, just three months before Title IX (Pub. L. No. 92-318, § 901, 86 Stat. 373) was enacted, the very same Congress had specifically provided for monetary relief (in the form of back pay) against local governments under Title VII (Pub. L. No. 92-261, § 2, 86 Stat. 103). There is, thus, no basis for concluding that Congress could not have contemplated monetary damages under Title IX because the result would be municipal government liability.

That the legislative debates (either in 1964 or 1972) are silent on the question of damages relief (Resp. Br. 26-30) is neither significant nor surprising. *See Cannon*, 441 U.S. at 694. Congressional attention simply was not focused on the question of what relief would be available to the victims of discrimination who could sue. And although respondents (Br. 26-27) and the government (U.S. Br. 20) point to the proposed, but ultimately omitted, Keating amendment to the bill that became Title VI in 1964—an amendment that would have expressly authorized a right to sue for injunctive relief—the omission of that amendment no more precludes damages relief than

it precludes a right of action or, obviously, injunctive relief, which is concededly available here. *See Cannon*, 441 U.S. at 715 n.51 (omission of Keating amendment does not bar right of action). Indeed, the omission could as readily suggest congressional dissatisfaction with limiting relief to preventive injunctions as it might suggest that damages relief was beyond the pale. *See* U.S. Br. 21.

Nor does it help the government to observe (U.S. Br. 21) that Congress did not provide for damages in creating express causes of action in the 1964 Civil Rights Act. For one thing, that Act did provide for monetary awards (back pay under Title VII, 42 U.S.C. § 2000e-5(g)). Although that remedy was characterized as "equitable relief," it appears that Congress used the term to indicate (what was potentially of vital importance in 1964) a preference that discrimination claims be decided by judges rather than juries. *See, e.g., Culpepper v. Reynolds Metals Co.*, 296 F. Supp. 1232, 1239-40 & n.5 (N.D. Ga. 1968), *rev'd on other grounds*, 421 F.2d 888 (5th Cir. 1970); *cf. Curtis v. Loether*, 415 U.S. 189, 191-92 (1974) ("supporters of Title VIII were concerned that the possibility of racial prejudice on juries might reduce the effectiveness of civil rights damages actions") (footnote omitted). In any event, as noted above (*see* p. 12 *supra*), an express provision specifying remedies for particular plaintiffs reflects a congressional determination to limit relief for such plaintiffs; and it is precisely such a determination that is missing when Congress grants a right of action but leaves relief unaddressed. The government's argument, therefore, could succeed only upon a showing that there is somehow an *inconsistency* between damages relief for Title IX violations and the limitations on relief in the 1964 Act. That, however, is plainly impossible—and not ever directly suggested by the government. Indeed, it is no more possible to draw such a conclusion with respect to the 1964 Act than to conclude, for example, that the availability of damages under 42 U.S.C. §§ 1981 and 1982 is inconsistent with

the limits on relief in Title VII (employment) or Title II (public accommodation) of the 1964 Act. This Court has several times rejected just such arguments that overlapping and supplementary remedies were impermissible. *See* Pet. Br. 10 n.7 (citing cases).

3. Respondents further suggest that injunctive relief is preferable to damages, in that equitable relief deters violations (Resp. Br. 34) and often benefits other program participants (*id.* at 11, 33). As an argument against damages, that suggestion is patently inadequate for several reasons.[10]

Most obviously, it proceeds on the incorrect premise that this case requires the Court to choose between injunctive and damages relief. Of course, there is no reason why *both* types of relief should not be available. Thus, even if equitable relief could sometimes advance Title IX's goals more effectively than damages relief, that would be no ground for holding that *only* equitable relief is available. In addition, the grounds advanced for preferring equitable to damages relief are unpersuasive. Thus, equitable relief often does *not* benefit others, and may even *harm* others, as when court-ordered reinstatement of an employee requires the firing or demotion of the employee wrongfully hired in the plaintiff's stead. And the threat of damages relief, like an injunction, has a well-recognized deterrent effect that benefits all Title

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[10] Respondents briefly suggest, in deference to the court of appeals' central reliance on *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981), that the recipients of federal funds are not on notice of the availability of damages relief. Resp. Br. 32-33 & n.32. But funds recipients are, of course, clearly on notice of their legal duty not to engage in discrimination—enforceable, even in respondents' view—and that is the only relevant notice under *Pennhurst*. Respondents seem to think that program recipients should be allowed to undertake a fine-tuned analysis of the ultimate costs of discriminating. Congress surely did not intend its prohibition on sex discrimination to be treated in that manner, as if the obligation could be discharged for a price.

IX beneficiaries. Indeed, as this Court has explicitly recognized, damages relief may often be an essential deterrent: unless faced with the prospect of damages, a defendant may feel free to engage in discrimination until ordered to stop. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975); *see Cannon*, 441 U.S. 705 (funding cutoff so extreme, and harmful to other students, that it is unlikely to be used to remedy individual discrimination).

The need for damages relief as an enforcement tool is, if anything, uniquely strong under a statute like Title IX, which prohibits discrimination against *students*, who are rapidly passing through their educational institutions. For such plaintiffs—for example, a high school student who is subject to discrimination in the middle of her senior year—any complaint seeking only prospective relief rapidly becomes moot. Many such plaintiffs, therefore, would have nothing to gain from a lawsuit, or so little that they would refrain from suing. Without damages, such plaintiffs would effectively be stripped of their Title IX rights, and educational institutions, of course, would be faced with that much less of a deterrent to discriminatory conduct. *Cf.* Resp. Br. 12 n.11 (citing *DeFunis v. Odegaard*, 416 U.S. 312 (1974), in which student's claim for injunctive relief became moot by progress through school, and noting that "[i]n contrast to requests for equitable relief, damages claims are never moot," citing *City of Los Angeles v. Lyons*, 461 U.S. 95 (1982)). In sum, damages are an appropriate and often necessary remedy for violations of Title IX that Congress authorized students like petitioner to bring to court.

CONCLUSION

The judgment of the court of appeals should be reversed, and petitioner's claim for damages reinstated.

Respectfully submitted,

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October 16, 1991 * *Counsel of Record*